

REMARKS

The above-noted amendments to the specification and claims are respectfully submitted in response to the official action dated December 4, 2006. These amendments are intended to correct certain typographical errors in the specification and claims, including those pointed out by the Examiner, and to more clearly and fully define the patentable subject matter of this invention. No new matter is included in these amendments.

While applicant will now deal with the specific rejections interposed by the Examiner in this case, it is particularly noted that one of the two references relied upon in the principal obviousness rejection in this case, which reference is relied upon, in fact, in each one of the rejections in this case, is not a proper reference under the provisions of 35 U.S.C. § 103(c). It is therefore clear that, even without the above-noted amendments to the claims, these claims are fully patentable over the prior art. Therefore, reconsideration and allowance of these claims is respectfully solicited.

Claims 1, 9-13, 16, 17, and 19-32 have been rejected as being unpatentable over Nishikata et al. '879 in view of Kolodziej et al. This rejection is respectfully traversed in view of the above amendments and arguments and for the reasons set forth hereinafter.

It is initially noted that Kolodziej et al., Patent Publication No. 2003/0064039, was published on April 3, 2003. Kolodziej et al. is based upon Application No. 10/233,293, which was filed in the U.S. Patent and Trademark Office on September 3, 2002, and which claims priority from Provisional Application No. 60/326,431, which was filed on October 3, 2001, which in turn claims priority from French Application No. 01 11374, which was filed on September 3, 2001. It is thus clear Kolodziej et al. is not a reference under the provisions

of 35 U.S.C. § 102(a) or (b), since it was not patented or described in a printed publication before applicant's invention or more than one year prior to the date of application of the present application. The present application was filed in the U.S. Patent and Trademark Office on September 17, 2003, claiming priority from French Application No. 02 11579, which was filed on September 18, 2002. It is thus clear that the applicant made the present invention far earlier than the publication date of Kolodziej *et al.*, and in fact filed his application far earlier than the publication of Kolodziej *et al.* It is therefore apparent that the only potential basis for citation of Kolodziej *et al.* under § 103 would be under the provisions of 35 U.S.C. § 102(e). However, in accordance with the provisions of 35 U.S.C. § 103(c), since Kolodziej *et al.* and the present application are assigned to the same assignee, namely L'Oreal (see the assignment records of the U.S. Patent and Trademark Office) the provisions of 35 U.S.C. § 103 are not applicable to this case. Therefore, once again, Kolodziej *et al.* is not properly citable in this rejection. Thus, based upon the Examiner's own position that the other prior art cited herein, including Nishikata *et al.* '879 does not disclose or obviate the present invention, it is clear that these claims are allowable over the art, and reconsideration and allowance of these claims is therefore respectfully solicited.

Turning to the other cited art, Nishikata *et al.* '879 is cited for its disclosure of using irradiating light having a wavelength range of visible light onto human skin onto which makeup is to be applied, in order to measure the spectra of reflected light at various incident angles to the surface. Thus, Figures 1 and 2 in Nishikata *et al.* '879 are said to show spectral reflectance and percentages to the wavelength of lights being reflected on normal skin and on skin on which a foundation has been applied as wavelengths ranging from 400 to 700  $\mu\text{m}$ . The

Examiner thus contends that the difference between the spectral reflectance therein is between 2% to 5%. The Examiner admits that the prior art does not disclose a multilayer interference pigment nor a physiologically acceptable medium. It is thus clear that, even based on the alleged teachings of Nishikata *et al.*, this reference alone does not create a *prima facie* case of obviousness with respect to claims such as claim 1, and that therefore these claims are allowable over this art.

However, in order to complete the record, it is further noted that it is not clear that the Examiner is correct even with respect to his allegation that the difference between the spectral reflectance of normal skin and that of skin with foundation in Nishikata *et al.* '879 is between 2% and 5%. A review of Figures 1 and 2 indicates that the two lines in those drawings represent a spectrum obtained using light with an incident angle of 85° (the dotted line) and using light with an incident angle of 40° (the solid line). In the case, for example, of the use of incident light of 85°, it appears that there is a difference in the spectral lines of far more than 5%, and in fact possibly even more than 20%. It is therefore unclear as to the precise nature of the overall teachings of Nishikata *et al.* '879. Again, however, irrespective of those teachings, and assuming that the Examiner's position is entirely correct with respect to this reference, without the combination of Kolodziej *et al.*, this reference cannot possibly be said to obviate these claims.

Claims 2, 3, 8, 14-16, and 18 have been rejected as being unpatentable over Nishikata *et al.* '879 and Kolodziej *et al.*, and further in view of Ounanian *et al.* under 35 U.S.C. § 103(a). This rejection is respectfully traversed in view of the above amendments and arguments and for the reasons set forth hereinafter.

Initially, applicant would again note that Kolodziej *et al.* is not properly applicable in this rejection under § 103(a), and withdrawal of this rejection is also respectfully solicited. In addition, Ounanian *et al.* is cited solely for its alleged teaching that improved foundations which provide smooth skin tone have spherical-shaped particles with diameters of up to 30  $\mu\text{m}$ . It is thus clear that Ounanian *et al.* is not even alleged to relate to the specific subject matter to which the present claims are directed, including the interference pigment which is the subject of claims 1 and 17. Furthermore, there is certainly no motivation to even combine Nishikata *et al.* '879 with Ounanian *et al.* in the first instance. In any event, however, without the allegedly critical teachings of Kolodziej *et al.*, this combination of three references also cannot be said to obviate these claims.

Claims 4-7 have been rejected as being unpatentable over Nishikata *et al.* '879, Kolodziej *et al.* and Ounanian *et al.*, and further in view of Nishikata *et al.* U.S. Patent Publication No. 2003/0035883 ("Nishikata *et al.* '883"). This rejection is respectfully traversed in view of the above amendments and arguments and for the further reasons set forth hereinafter.

In addition to applicant's above comments with regard to the cited references, including the inapplicable nature of Kolodziej *et al.* as a reference at all in this case, the addition of Nishikata *et al.* '883 is not helpful in this regard. This publication, in fact, has been cited solely for the purpose of allegedly teaching a coated powder with a spherical-shaped silica core with particle sizes of from 0.05 to 45  $\mu\text{m}$ , with the silica coated with a mixture of iron and silica or titanium. The Examiner contends that there is motivation to combine these references because Nishikata *et al.* '883 discloses a cosmetic

product which, because of its spherical shape, allows light to diffuse and transmit uniformly. Simply because Nishikata et al. '883, like any publication directed to this entire field of endeavor, relates to alleged improvements in cosmetic products, does not mean that there is sufficient justification for combining that reference with any other reference in this broad field. Once again, however, it is submitted that even if these combinations were properly made, which applicant denies, in view of the inapplicable nature of Kolodziej et al. hereagainst, it is clear that a *prima facie* case of obviousness has not been set forth by the Examiner, and reconsideration and allowance of these claims is therefore also respectfully solicited.

Claims 33-40 have been rejected as being unpatentable over Nishikata et al. '879 in view of Kolodziej et al. under 35 U.S.C. § 103(a). This rejection is respectfully traversed in view of the above amendments and arguments and for the reasons set forth hereinafter.

Once again, the Examiner's reliance on Kolodziej et al. is misplaced, and it remains clear that this rejection has not been properly made, and withdrawal and reconsideration of the allowance of these claims is respectfully solicited.

It is therefore respectfully submitted, particularly in view of the inapplicable nature of Kolodziej et al., that all of the pending claims in this application possess the requisite novelty, utility and unobviousness to warrant their immediate allowance, and such action is therefore respectfully solicited. If, however, for any reason the Examiner still does not believe that such action can be taken at this time, it is respectfully requested that the Examiner telephone applicant's attorney at (908) 654-5000 in order to overcome any further objections the Examiner might have to the allowance of these claims.

Application No.: 10/664,197

Docket No.: LOREAL 3.0-060

Finally, if there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

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Respectfully submitted,

By 

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